

THE HONORABLE JUDGE ROBERT J. BRYAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LAWRENCE HARTFORD, et al.,

Plaintiffs,

-vs-

BOB FERGUSON, in his official capacity as
Washington State Attorney General, et al.,

Defendants.

NO. 3:23-cv-05364-RJB

REPLY IN SUPPORT OF DEFENDANT
ENRIGHT AND GESE'S MOTION TO
DISMISS 42 U.S.C. §1983 & §1988
CLAIMS AND DAMAGES

NOTE ON MOTION CALENDAR:
June 9, 2023

I. REPLY

Plaintiffs seek to challenge the constitutionality of SHB 1240 and seek declaratory judgment and injunctive relief. Plaintiffs bring their claims under 28 U.S.C. §§1651 (writs), §2201 (declaratory judgment), §2202 (further relief), and 42 U.S.C. §1983 and §1988 (civil rights cause of action). Dkt. 1, ¶8. Defendants' motion does not address the merits of claims for relief under 28 U.S.C. §1651, §2201, or §2202. Defendants merely seek dismissal of all claims for relief under 42 U.S.C. §1983 and §1988 because Plaintiffs have failed to state a sufficient cause of action under these codes. Plaintiffs' response clearly confirms that they are not seeking any damages under 42 U.S.C. §1983 (despite the fact that their complaint indicates otherwise) and that they are not

pursuing 42 U.S.C. §1983 *Monell* claims. They nonetheless appear to assert that they are entitled to proceed with such claims and that they are entitled to attorney fees under 42 U.S.C. §1988. This position is incorrect and not supported by any legal authority. Because Plaintiffs' complaint fails to articulate any cause of action under 42 U.S.C. §1983, the Court should dismiss with prejudice all claims for relief pursuant to 42 U.S.C. §1983 and §1988.

A. Plaintiffs Concede They Are Not Bringing A Claim Under 42 U.S.C. §1983

Plaintiffs' complaint clearly states, "Plaintiffs seek remedies under 28 U.S.C. §§1651, 2201, and 2202, and 42 U.S.C. §1983 and 1988." Dkt. 1, ¶8 (emphasis added). Plaintiffs' first cause of action cites 42 U.S.C. §1983. Dkt. 1, page 18. Finally, Plaintiffs' complaint references 42 U.S.C. §1983 in a third place. Dkt. 1, ¶88. Despite these references in the complaint, Plaintiffs state they are not seeking damages under 42 U.S.C. §1983.

Plaintiffs concede that they are not attempting to bring a *Monell* claim (or any other 42 U.S.C. §1983 claim) against Defendants, but insinuate they are attempting to bring an "official-capacity" suit against Defendants. In support of their argument, Plaintiffs cite to *Buffin v. California*, 23 F.4th 951, 956 (9th Cir. 2022), a case involving a §1983 claim for damages in which defendants were ultimately deemed to have immunity. This case does not assist Plaintiffs' argument. As indicated in Defendants' motion, federal law makes no distinction between a *Monell* claim and a claim against an official in their official capacity. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989); *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity."). Since Plaintiffs have conceded they are not bringing a *Monell* claim and as Plaintiffs have failed to articulate any personal participation by County Defendants in any constitutional violation, all claims for relief under 42 U.S.C. §1983 should be dismissed with prejudice.

1 While Plaintiffs seek to obtain and enforce a declaratory judgment against Defendants
 2 Enright and Gese, their complaint fails to articulate a basis for declaratory judgment or injunctive
 3 relief under 42 U.S.C. §1983. The case law cited by Plaintiffs directly supports dismissal of
 4 Plaintiffs' 42 U.S.C. §1983 and §1988 claims. In *Mitchell v. Atkins*, 387 F. Supp. 3d 1193, 1201
 5 (W.D. Wash. 2019), the court granted a motion to dismiss 42 U.S.C. §1983 claims against County
 6 defendants under similar circumstances in a case brought by Plaintiffs' counsel.
 7

8 To the extent Plaintiffs' complaint attempts to articulate a 42 U.S.C. §1983 claim against
 9 Defendants Enright and Gese, such claims should be dismissed based upon Plaintiffs own
 10 concession that they are not pursuing any such claims.
 11

12 **B. Plaintiffs Have Not Articulated Entitlement to Attorney Fees Under 42 U.S.C. §1988**

13 Plaintiffs state they are not seeking damages under 42 U.S.C. §1983, however, Plaintiffs
 14 confirm they are seeking attorney fees under 42 U.S.C. §1988 ("§1988"). §1988 states, in pertinent
 15 part, as follows:
 16

17 In any action or proceeding to enforce a provision of
 18 sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX
 19 of Public Law 92-318 [20 U.S.C. 1681 et seq.], the Religious Freedom
 20 Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], the Religious Land Use
 21 and Institutionalized Persons Act of 2000 [42 U.S.C. 2000cc et seq.], title VI
 of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or section 12361
 of title 34, the court, in its discretion, may allow the prevailing party, other
 than the United States, a reasonable attorney's fee as part of the costs [...].

22 Based upon the above, a plaintiff may be entitled to attorney fees in any action or proceeding to
 23 enforce 42 U.S.C. §1983, or in any other action expressly enumerated in §1988. Critically, actions
 24 under 28 U.S.C. §1651, §2201, and §2202 are not among those actions or proceedings. As
 25 Plaintiffs have failed to articulate a cause of action under 42 U.S.C. §1983, and have expressly
 26 avowed such a claim, then they are not entitled to attorney fees under §1988. Plaintiffs have offered
 27
 28

no case law or authority to support the argument that they are entitled to attorney fees under §1988 in this case in the absence of a valid claim under 42 U.S.C. §1983.

Plaintiffs' reliance on case law does not advance the argument that they are entitled to attorney fees under §1988 in this case. In *Hensley v. Eckerhart*, 461 U.S. 424, 426 (1983), the court did not address or identify the underlying causes of action which triggered attorney fees under §1988. In *Motorola, Inc. v. Fed. Express Corp.*, 308 F.3d 995 (9th Cir. 2002), attorney fees were not awarded under §1988. In *BFI Med. Waste Sys. v. Whatcom County*, 983 F.2d 911, 914 (9th Cir. 1993) and *Kentucky v. Graham*, 473 U.S. 159 (1985), the plaintiffs prevailed on underlying 42 U.S.C. §1983 claims.

Plaintiffs' complaint does not articulate any valid cause of action for which attorney fees under §1988 are available. For this reason, the Court should dismiss, with prejudice, Plaintiffs' claims for attorney fees under §1988.

II. CONCLUSION

For the reasons set forth above, Plaintiffs' claims for relief and damages under 42 U.S.C. § 1983 and § 1989 against Defendants Gese and Enright should be dismissed with prejudice.

I certify that this memorandum contains 1008 words, in compliance with the Local Civil Rules.

Respectfully submitted this 6th day of June, 2023.

CHAD M. ENRIGHT
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/s/ Christine M. Palmer

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CERTIFICATE OF SERVICE

I certify that on June 6, 2023, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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1 SIGNED in Port Orchard, Washington this 6th day of June, 2023.

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